

**IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO**

EVANS LANDSCAPING , INC.,	:	APPEAL NO. C-090139
		TRIAL NO. 08CV-02504
Plaintiff-Appellant,	:	
vs.	:	<i>DECISION.</i>
WILLARD GRUBB,	:	
Defendant-Appellee.	:	

Civil Appeal From: Hamilton County Municipal Court

Judgment Appealed From Is: Affirmed in Part, Reversed in Part, and Cause  
Remanded

Date of Judgment Entry on Appeal: December 18, 2009

*Anthony J. Muto*, for Plaintiff-Appellant,

*Robert G. Kelly*, for Defendant-Appellee.

Please note: This case has been removed from the accelerated calendar.

**WILLIAM L. MALLORY, Judge.**

{¶1} Plaintiff-appellant Evans Landscaping, Inc., sued defendant-appellee Willard Grubb seeking payment for landscaping work that had been done under a March 2007 time-and-materials contract. Grubb counterclaimed, alleging that Evans had breached a December 2006 contract, and that Evans's March work had been performed to remedy its December breach. In his answer and counterclaim, Grubb further alleged that he had not signed a March contract. Following a bench trial, the court concluded that Evans had breached the December contract, and that there was a valid March contract. The court then entered an \$8,400 judgment for Grubb on his counterclaim.

{¶2} In its appeal, Evans argues that the award of damages and the court's findings of fact and conclusions of law were not supported by the evidence. We hold that the trial court improperly calculated Grubb's damages because it erred in finding that the December contract had required debris to be stacked into burnable piles, and because it did not consider Grubb's testimony that he had been made whole when he had paid another landscaping company \$2,145 to remedy Evans's December breach. We affirm that part of the judgment holding Evans liable to Grubb, but we reverse the award of damages against Evans and remand the case for a recalculation of damages under the December contract and for a further review of the March contract in light of this decision.

***I. Evans Agrees to Clear Grubb's Land***

{¶3} In December of 2006, Grubb and Evans agreed to clear land on a time-and-materials basis. Under that agreement, Evans was to mow small brush and saplings; remove all remaining unwanted trees, brush, and undergrowth; cut all

remaining material into manageable lengths; dig out stumps; and leave all logs and stumps in organized piles across the property. And Grubb was to obtain the necessary permits or inspections. The December contract twice stipulated that the job, including equipment and labor for clearing the property, was to be performed on a time-and-materials basis. The contract also specified that though “budgets and rates have been provided, [the] total could vary plus or minus.”

{¶4} Notably, the time-and-materials contract did not list a final price; it listed only hourly rates and equipment hauling fees. At the end of the document were handwritten estimated figures. Our conclusion that these handwritten figures were estimates is buttressed by the contract language stating that the job was to be done on a time-and-materials basis; by the contract’s express disclaimer that the “total could vary plus or minus;” and by Grubb’s own testimony that characterized the written and signed figures as estimates.

{¶5} Evans cleared Grubb’s land in December and invoiced about \$9,700 of the work, which Grubb paid in full and without protest. Grubb’s protest came only after he had paid Evans’s invoices in full, and after he had seen that his land still had equipment ruts and had not been back-dragged or leveled.

## ***II. Grubb’s Discontent—Burnable Piles?***

{¶6} Grubb testified that Evans had cleared his land and placed the debris into five or six large piles, but that Evans had failed to make neat and manageable piles—eventually Evans, at Grubb’s direction, pushed the piles of debris to the back of Grubb’s property. Grubb further testified that the reason that he wanted the debris placed into neat and manageable piles was so that he could burn the piles (rather than having to pay Evans \$500 an hour to bring a dragger in). Grubb also asserted that Evans knew that he had wanted the debris placed into piles that would be burned. Grubb directed Evans’s

work, but it took him until March 2007 to find out that burnable piles had to be in dimensions of five feet by five feet, and he never directed Evans to stack debris into piles of those dimensions.

{¶7} Evans cleared Grubb's land again in March, and Grubb's nonpayment for that work was the basis of Evans's complaint. Grubb contended that he never signed a March contract, and that the March work was remedial in nature.

{¶8} Grubb testified that neither in December nor in March had any worker asked for his direction and that he had not given any direction because the workers "knew what needed to be done" and because, according to Grubb, there was a "written contract stating that the debris [wa]s to be put in neat manageable piles for burning." The contract itself did not call for burnable piles, but it did make Grubb expressly responsible for the necessary permits and inspections. Therefore the onus was on him to find out what constituted a burnable pile and then to relay that information to Evans and to direct Evans to move the debris according to what was required. Evans acted at Grubb's direction, and Grubb failed for a period of several months to ascertain what constituted a burnable pile, and he likewise failed to convey that information, or direct Evans to act accordingly, once it was learned.

{¶9} We also note that the parties do not dispute that Grubb paid Green Excavating \$2,145 after the December contract had been completed. Grubb testified that Green Excavating came out twice and "back-dug the property, leveled it out, and got all the high ruts and stumps that w[ere] left behind by Evans."

### ***III. An Incorrect Calculation of Damages***

{¶10} The trial court found, among other things, that Evans had breached the December contract. In its decision, the court specifically explained that Evans had breached its contract by failing to remove trees, brush, and undergrowth; cut remaining

materials into manageable lengths; leave all logs and stumps in organized piles across the property; and clean up and leave the site in a neat, orderly fashion.

{¶11} After Evans had completed a large portion of the December contract, Grubb wanted the equipment ruts removed and the property leveled and back-dragged (cleaned up). Evans charged Grubb to do so, but for whatever reason Evans failed to complete this aspect of the job. Grubb then hired another landscaping company to complete the leftover tasks. And in these respects alone, we are convinced that Evans breached the December contract.

{¶12} In a case such as this, the measure of damages to be awarded should “place the injured party in as good a position as it would have been but for the breach.”<sup>1</sup> Generally an injured party cannot recover damages for breach of contract beyond the amount that is established by the evidence with reasonable certainty.<sup>2</sup> And those compensatory damages are limited to actual loss.<sup>3</sup>

{¶13} Grubb’s witness Ken Worley testified that it would cost \$8,400 to make the debris burnable, and the trial court based its award of damages on that figure.

{¶14} The court’s reliance on Worley’s testimony is curious because, as we have noted, the contract did not require that piles be burnable, and we are convinced that at the contract’s inception neither party contemplated that the debris would be moved into five-foot by five-foot piles. The contract called for the clearing work to be done on a time-and-materials basis, and—except for the cleanup activity (the back-dragging, leveling, and stump removal that precipitated Evans’s breach)—that was what was done. Even if we assume that the parties had intended that the piles be stacked in such a manner that they could be burned, the onus was on Grubb to obtain burn

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<sup>1</sup> *Textron Fin. Corp. v. Nationwide Mut. Ins. Co.* (1996), 115 Ohio App.3d 137, 684 N.E.2d 1261.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

permits, to discover that the piles had to be five feet by five feet to be considered burnable, and then to direct Evans to stack the debris in those dimensions. And Evans's corresponding duty under the contract was to clear the land at an hourly rate under Grubb's direction—not to ascertain what constituted a burnable pile. Grubb did not direct Evans to place the debris in five-foot by five-foot piles, and he could not have done so because he did not find out until March that burnable piles had to be five feet by five feet.

{¶15} Because the contract did not call for burnable piles, Grubb's witness's testimony was largely irrelevant. And it was error for the trial court to award Grubb \$8,400 because that figure represented the amount it would have taken to make Grubb whole only if the parties had contemplated that debris would be arranged in burnable piles. Our conclusion that \$8,400 was an incorrect calculation of damages is buttressed by Grubb's testimony that Green Excavating had cured Evans's breach. Thus an approximation of damages would have been the amount that Grubb had paid Green Excavating to remedy Evans's breach. We therefore reverse the trial court's award of damages and remand this case to recalculate what damages were incurred when Evans failed, under the December contract, to leave the property in a neat and orderly fashion.

#### ***IV. Considerations on Remand***

{¶16} In remanding this case to the trial court, we advise the court to consider that both contracts called for Evans to work on a time-and-materials basis<sup>4</sup> and set out only an estimate, an hourly rate, and a hauling fee for the personnel and equipment used; that neither the December nor the March time-and-materials contract contemplated that Evans would leave the debris in burnable piles—to have required

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<sup>4</sup> Time and materials contracts are useful when "it is not possible at the time of contracting to estimate accurately the extent or duration of the work or to anticipate costs with any reasonable degree of confidence." Section 16.601(e), Title 48, C.F.R.

such work at a fixed price would seemingly have been inconsistent with the rationale for using a time-and-materials contract in the first instance; that Evans breached the December contract only insofar as it failed to fill equipment ruts and level and back-drag the property; and that Grubb testified Green Excavating had remedied Evans's breach.

#### ***V. The March Contract***

{¶17} On remand, the trial court must also revisit the March contract. The trial court's decision impliedly recognized a valid March contract, and from our review of the record, it appears that a March contract existed—and even if it did not, the court must evaluate whether Grubb has been unjustly enriched by Evans's March performance.

#### ***VI. Conclusion***

{¶18} In light of the foregoing considerations, we reverse the trial court's award of damages and remand this case so that the court can reconsider damages under the December contract and reevaluate the legal significance of the March contract.

{¶19} As we have noted, both the December and March contracts were to be performed on a time-and-materials basis, and it is undisputed that Evans performed under both contracts. Because the contracts did not contemplate that debris be stacked into burnable piles, the trial court erred in awarding damages for the failure to make such piles. But the remaining part of the court's judgment holding Evans liable to Grubb is affirmed.

Judgment affirmed in part and reversed in part, and cause remanded.

**HENDON, P.J., and DINKELACKER, J., concur.**

*Please Note:*

The court has recorded its own entry this date.